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Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

John Worley,
Petitioner,

v.

United States,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Petitioner, John Worley, is a tax lawyer convicted of "counseling" his clients to prepare a false income tax return. He rendered a legal opinion that a tax shelter would yield a tax deductible loss.

John Worley sought to introduce the testimony of a tax law professor that the legal opinion was reasonable, given the state of the law at the time. The trial court excluded the testimony.

Was it error to exclude the testimony of the tax law professor?

LIST OF ALL PARTIES

The following persons were parties to the appeal to the Fifth Circuit Court of Appeals, whose judgment is sought to be reviewed:

James G. Bryan of Irvine, California.
James A. Hearn of Dallas, Texas.
Eugene R. Jackson of Houston, Texas.
Julian Malcomson of St. Paul, Minnesota.
John Worley of Dallas, Texas.

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JOHN WORLEY,
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UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

John Worley hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered February 22, 1990, which affirmed the conviction of John Worley in the United States District Court for the Northern District of Texas.

OPINIONS BELOW

The February 22, 1990 Opinion of the Fifth Circuit Court of Appeals and the March 26, 1990 Orders overruling the Petitions for Rehearing are set out in the attached Appendix. The Opinion of the Court of Appeals is published as United States v. Bryan, 896 F.2d 68 (5th Cir. 1990).

JURISDICTION

John Worley was indicted and convicted of violating 26 U.S.C. § 7206 (2) (counseling the preparation of a false income tax return) and 18 U.S.C. § 371 (conspiracy to defraud the United States). The Court of Appeals entered its Judgment below (affirming the convictions) on February 22, 1990. Two of John Worley's co-defendants/appellants filed timely petitions for rehearing on March 6, 1990, which were overruled on March 26, 1990.

Pursuant to Supreme Court Rule 13.4, the deadline for John Worley to petition for Writ of Certiorari began to run on the date such petitions for rehearing were overruled. Within the ninety days allowed for filing the Petition for Writ of Certiorari, counsel for John Worley filed a timely application for extension of time. Justice White granted such application on May 14, 1990, extending the deadline for the Petition for Writ of Certiorari up to and including June 22, 1990.

The jurisdiction of this Court is invoked by 28 U.S.C. § 1254 (1).

STATUTES AND RULES IN QUESTION

John Worley was convicted of violating the following statutes:

26 U.S.C. § 7206(2):

"Any person who--willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim or document; shall be guilty of a felony and, upon conviction

thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution".

18 U.S.C. § 371:
"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned no more than five years, or both."

John Worley sought introduction of Professor Streng's testimony pursuant to Federal Rule of Evidence 702 "Testimony by Experts":

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

STATEMENT OF THE CASE

John Worley was indicted and convicted for rendering legal advice to one couple, the Kaplans, in November 1983. This legal advice was alleged to constitute "counseling" the preparation of a false income tax return (in violation of 26 U.S.C. § 7206(2) and conspiracy to defraud the United States (in violation of 18 U.S.C. § 371). (See Count 8 of the Indictment, which is incorporated into Count 1. App. Pg 64.)

John Worley's legal advice was that a commodities tax shelter (often referred to as a "commodities straddle") would

yield a tax deductible loss.[1] The indictment alleged that John Worley rendered this legal advice even though he knew that any resulting loss would not truly be deductible under federal income tax law. App. Pg 64 No other conduct by John Worley was alleged in the Indictment or in the related Bill of Particulars. App. Pgs 52-65

Since the Fifth Circuit affirms John Worley's conviction with no mention whatsoever of the Kaplans or their tax return, it will be necessary to review the underlying facts in this Petition.

Perhaps the best summarization of the facts about John Worley was provided by the jury at the end of the trial. After the trial, the jury wrote letters to Judge Maloney to express their views that John Worley should not be incarcerated. The judge revealed the contents of those letters in the following statement, which is in the record:

> It was the feeling of the majority of the jury that Mr. Worley is fresh out of law school and jumped in over his head with a view to further his own career as quickly as possible. And that in that event he was just not as careful as his legal training should have made him.

1. WCM Was Formed And Operated Without John Worley.

John Worley was still in law school (obtaining his L.L.M. in tax at Southern Methodist University) at the time that James Bryan and James Hearn were busy setting up Worldwide Capital Management (later called U.S.T.P.S.) in 1981. John Worley didn't even know Bryan and Hearn. After

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[1]Neither the Indictment (App. Pg 51) nor the Bill of Particulars (App. Pg 65) accused John Worley of any actions with respect to two other more questionable tax shelters with which his co-defendants were involved.

graduating, John Worley was attempting to start his own solo law office specializing in tax work.

Meanwhile, unbeknownst to John Worley, Worldwide Capital Management ("WCM"), was busy developing "aggressive tax shelters." One such shelter utilized commodities trades and Cayman Islands companies and trusts.

2. John Worley Begins His Work With WCM.

In May of 1983, John Worley met James Hearn for the first time. John Worley began working for WCM as independent counsel in June 1983. At WCM, the vast majority of John Worley's work was on domestic tax shelters, such as oil and gas partnerships. These domestic tax shelters have nothing to do with the foreign tax shelters attacked by the Government in this case.

During his short tenure at WCM, John Worley never owned any piece of the business. He never earned a commission on the sale of any tax shelter. He never prepared or filed any tax returns or formed any of the corporations involved in the tax shelters. He was paid merely for rendering legal advice to WCM clients.

Ron Williams (the Government's main witness) confirmed that John Worley's role at WCM was always to evaluate tax shelters with the purpose of making sure they complied with the law.

3. John Worley's Advice To The Kaplans.

In November of 1983, John Worley attended two meetings to discuss tax planning for Stuart and Sherry Kaplan. Their 1983 Income Tax Return is the sole subject of the indictment and conviction of John Worley.

The meetings were attended by John Worley, Ron Williams (who became a Government witness by plea agreement), and Mr. Kaplan (the taxpayer who was also a

Government witness). All three of these witnesses gave a very similar description of the meetings, including their purpose. All three testified that the parties sat down with the intention lawfully to plan the best means for the Kaplans to defer their taxes.

Stuart Kaplan was considering exercising a stock option at his business. If he did, he would receive income of several hundred thousand dollars. Stuart Kaplan was looking to "see if there was ways to defer that income." It is important to understand that Mr. Kaplan was not looking for a way to escape all tax liability. In his own words his goal was to defer income and put off paying taxes until another day. Mr. Kaplan said that, being from Oklahoma, he was use to oil and gas tax shelters that were used "to defer those kinds of things."

According to Mr. Kaplan, he met with John Worley twice in November 1983. John Worley suggested that Mr. Kaplan enter into a commodities tax shelter. John Worley rendered his legal opinion that the shelter would yield a tax deductible loss.

Those November meetings were the last time that John Worley saw the Kaplans or conversed with them. What John Worley did not know when he rendered his tax opinions was that the commodities transactions the Kaplans would someday claim on their tax return would, in fact, be fake transactions.

4. Unbeknownst To John Worley, The Commodities Transactions Were Never Actually Executed.

Actually the Kaplans did not really engage in the commodities transactions that had been described to John Worley. Months later, Intercon Commodities provided a dummy "Monthly Commodity Statement" to the Kaplans. This false Statement showed $59,977.50 in loses from fictitious soybean trades in December of 1983. In reality, the so-called "losses" were actually incurred earlier in the year in other trades for other taxpayers who did not need the deductions.

The "losses" were later assigned to the Kaplans by means of the fraudulent Intercon Commodities statement. The Kaplans claimed the $59,977.50 commodity "losses" on their 1983 Income Tax Return, filed in June of 1984. App. Pg 64 This was over six months after John Worley had given his legal advice.

John Worley did not prepare, review, or file the Kaplan's income tax return. To the contrary, Sherry Kaplan testified positively (on behalf of the Government), "The only person that did the tax returns was the Garners [two CPA's who were brothers]."

Despite the Fifth Circuit's assertions to the contrary, there is no evidence in the record that John Worley knew that fictitious commodity transactions would be used in the tax shelter.[2] In this regard, the Fifth Circuit claims to be viewing the evidence through the "lens which an appellate court must use." No lens is necessary. The Government's own witnesses admitted that they had no reason to believe that John Worley knew that the Kaplans commodities losses had been fabricated. In fact, the main Government witness (Ron Williams) testified that, at the time of the November 1983 meeting, even he (who had hired and supervised John Worley) did not know that faked commodities transactions would be used. He testified at trial, "I don't know of any way that John knew that the trades were done unlawfully."

John Worley testified that he was absolutely never told that any commodities losses had been "assigned" from one person to another. In May, 1984, (less than one year from John Worley's start with WCM) WCM was suddenly shut down by the IRS, which confiscated WCM's records with a subpoena. John Worley's short career as a tax lawyer was over.

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[2]If the Government can point to any witness who testified that John Worley knew the Kaplan's commodities trades were going to be faked, then John Worley will voluntarily dismiss this Petition.

5. John Worley Attempted To Defend His Tax Opinion.

At trial, John Worley admitted that he rendered the legal advice that the commodities loss would be deductible. He attempted to build his defense on the reasonableness of his legal opinion. He sought to introduce testimony from a tax professor, William Streng. Professor Streng would testify that, given the state of the law in 1983, a reasonable attorney could believe that the commodities loss would be deductible and the tax shelter legal. The trial court excluded this evidence.

John Worley was convicted on both counts. On May 26, 1988 John Worley was sentenced to five years probation. As a result, he may lose his license to practice law.

John Worley appealed from his conviction. On February 22, 1990, the Fifth Circuit Court of Appeals affirmed his conviction without any mention of his meetings with the Kaplans or their tax return (the sole subject of the Indictment against Worley). The Fifth Circuit held that the trial court committed no error in excluding the tax professor's testimony. App. Pg 38

John Worley petitions this Court to grant a Writ of Certiorari.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The Courts of Appeals apply a double-standard when it comes to expert testimony in prosecution of tax evasion cases. This is because there are two divergent lines of case authority. Following precedent from this Court, the government is **always** allowed to introduce its interpretation of the tax laws, usually through testimony of an IRS agent. However, because of an independent line of cases developed in the Fifth Circuit, the defendant is usually prohibited from introducing any form of contrary expert testimony. This double-standard is completely

unfair. The income tax laws are subject to widely varying interpretations. Juries should hear both sides.

John Worley admitted that he rendered the legal opinion that the loss would be deductible. He attempted to defend himself by defending his legal opinion. His defense was emasculated when the trial court (following the independent line of cases developed in the Fifth Circuit) excluded the testimony of a tax law professor. This professor would have testified that a reasonable tax lawyer, in 1983, could believe that this type of commodities "straddle" tax shelter would produce a deductible loss. John Worley was denied a fair trial.

REASONS FOR GRANTING THE WRIT

I. The Exclusion Of Expert Testimony On Tax Law Deprives Defendants Of A Fair Trial.

This case presents an important legal question: When the IRS attacks its natural enemy (the private tax lawyer) for rendering a tax opinion, can the tax lawyer defend himself by calling upon learned members of his profession to defend his views as reasonable? This Court has never addressed the question of whether any defendant (lawyer or layman) can introduce evidence about the tax law in his defense.

The answer to this question is particularly important to tax attorneys because the Government has begun to attack tax attorneys in criminal prosecutions:

> In recent years tax attorneys, accountants and return preparers have become a focus of increased scrutiny by the Internal Revenue Service, the Department of Justice and local United States Attorney's Offices as a result of their professional activities . . . . There is also an expanding interest of the Government in prosecuting tax advisors for criminal activities arising out of the representation of clients.

Barbara T. Kaplan, 36 N.Y.U. Institute on Federal Tax, § 16-1 (1988).

Before we can answer the question we must understand the context.

A. The Internal Revenue Code Is Subject To Interpretation.

The eternal struggle between tax collector and tax payer is fought in a very complex arena. Even learned members of the nation's highest court do no always agree on the "correct" interpretation of the Internal Revenue Code. Even a simple question (whether a meal allowance constitutes income?) found a difference of opinion among the members of this Court. C.I.R. v. Kowalski, 434 U.S. 77, 98 S.Ct. 315, 54 L.Ed.2d 252 (1977) The majority said "yes," but Chief Justice Burger and Justice Blackmun dissented.

Studies show that tax professionals do not agree about the correct interpretation of the tax law. When fifty different tax professionals were given information with which to file an average return for a family of four, no two come up with the same answer. The Pros Flunk Our New Tax Return Test, Money, March, 1989, pp. 110-112. Even inquiries to the Internal Revenue Service yield incorrect answers about 41% of the time. Id. at p. 112. (A copy of this article is reproduced in the Appendix at Pg 71)

The relevant area of law in this case (commodities straddles utilizing foreign non-controlled corporations) was extremely confused during the early 1980's. (This will be discussed in detail below, at page 24) Suffice it to say that there was a four-way battle of opinions between the Tax Court, the IRS, the Courts of Appeals, and Congress.

B. The Tax Lawyer Is Often In Conflict With The IRS Regarding Interpretation.

The tax lawyer is not an impartial player in this struggle. He is paid to champion the tax payer's cause against the tax collector. Indeed, Canon 7 of the Texas Code of Professional Responsibility (under which John Worley practiced) required that he "zealously" represent his client's rights against the government. This inevitably means that the tax lawyer is at odds with the government:

> The tax lawyer's client almost always seeks to minimize the tax liability owed to his Government under an Internal Revenue Code that leaves ample room for differences of opinion. Therefore, in discharging his ethical duty to provide "zealous representation," the tax lawyer must prefer client over tax collector, at least so long as there is a "reasonable basis" for the client's position. In few other fields of practice do lawyers so continuously find that effective representation of clients requires them to challenge repeatedly the operation of a governmental system.

James Holden, Evolving Standards of Professional Responsibility In Federal Tax Practice: The Circular 230 Amendments and Related Matters, 40th Annual N.Y.U. Institute § 14.01 (1982)

In advising a client about a tax shelter, the lawyer is supposed to prognosticate what a court will do when faced with the facts described by the client. Guessing at what courts will decide is not an easy task. Even learned judges on the same court sometimes disagree sharply about tax law.

C. The Courts Of Appeals **Always** Allow The IRS To Introduce Its Interpretation Of The Law.

The Supreme Court has never decided whether a defendant in a tax evasion case has a right to introduce testimony from an expert on tax law. The Fifth Circuit has developed a line of cases (now being followed by other circuits) that virtually require the exclusion of such testimony. However, this position seems at odds with the Supreme Court's holding in United States v. Johnson, 319 U.S. 503, 63 S.Ct. 1233, 87 L.Ed. 1546 (1943).

In Johnson, this Court approved of the government's use of a tax expert to render opinions on the application of tax law to a particular transaction. The Courts of Appeals have narrowly followed Johnson and only allowed the government to introduce expert testimony on tax law. In Johnson, this Court reviewed the conviction of a tax payer for evasion of federal income tax. At trial, the Government's expert witness, an IRS agent, reviewed "hundreds of exhibits" in the record and rendered an opinion that the defendants owed taxes to the United States. (For a more detailed account of his testimony, see the lower court's opinion at 123 F.2d 111, 127).

In approving of this form of expert testimony, this Court seemed to assume that the defendant could also introduce expert testimony on his version of the proper application of federal income tax law:

> The jury in this case could not possibly have been misled into the notion that they must accept the calculations of the government expert any more than that they were bound by the calculations made by the defense's expert based on the defendant's assumptions of the case.

Id. 319 U.S. at 519.

In Johnson this Court appeared to envision a trial in which both prosecution and defense experts could state their opinions on the correct tax treatment of a transaction. Unfortunately, the Courts of Appeals have shared only half of that vision. Citing Johnson, the Courts of Appeals always allow an IRS agent to tell his interpretation of the federal income tax law to the jury. (However, as will be explained later in this Petition, when the defendant attempts to introduce the testimony of a expert witness, to explain that the law is subject to a different interpretations, then the Courts of Appeals recoil in horror.)

Over 15 years ago, the Fifth Circuit Court of Appeals recognized that, after this Court's decision in Johnson, the accepted practice in tax evasion cases is to allow the government to have an IRS agent (usually the prosecution's last witness) summarize the evidence and render his opinion on the "correct" tax treatment of a transaction:

> The propriety of that practice in income tax cases was clearly established by the Supreme Court in United States v. Johnson, 1943, 319 U.S. 503, 519, 63 S.Ct. 1233, 87 L.Ed. 1546. Since Johnson, the practice has been accepted and followed in cases too numerous to mention . . . [citations omitted]

United States v. Gray, 507 F.2d 1013, 1017 (5th Cir.), cert. denied, 423 U.S. 824 (1975).

The practice of using IRS agents to render expert opinions has become so common it appears that some IRS agents do this as a full-time job. In United States v. Schafer, 580 F.2d 774, 778 (5th Cir.), cert. denied, 439 U.S. 970 (1978) the IRS witness for the prosecution explained that he had testified as an expert for the IRS in over seventy trials.

There can be no doubt that the IRS agents are rendering legal opinions on the interpretation of federal income tax law and its application to a given transaction. In United States v.

Fogg, 652 F.2d 551, 556-557 (5th Cir. Unit B 1981), cert. denied, 456 U.S. 905 (1982) the IRS agent (an accountant) gave his opinion that certain payments should be classified as "constructive dividends" for purposes of taxation. The Court of Appeals had to admit that this opinion involved a legal conclusion. However, they reasoned that an accountant has an "adequate knowledge of the tax laws" to render such an opinion. Again, the court cited Johnson, supra, in defending the admission of the expert testimony. Id. 652 F.2d at 556.

Similarly, in United States v. Gray, supra, the IRS agent rendered his opinion about the proper tax treatment of various costs incurred in drilling for oil. The trial court even recessed the trial so the IRS agent could review three court decisions to see if these affected his legal opinion. Id. 507 F.2d at 1018.

D. On the Other Hand, Defendants Are Usually Prohibited From Introducing Their Interpretation Of The Law.

For a short time the Fifth Circuit embraced an even-handed approach (consistent with United States v. Johnson) that both prosecution and defense should be allowed to have experts give their varying interpretations on the proper application of federal income tax law. In United States v. Garber, 607 F.2d 92 (5th Cir. 1979) (en banc) the taxpayer was convicted of willfully evading taxes. She failed to report income from the sale of her rare blood plasma. At trial, both the government and the defense proffered expert testimony on the correct tax treatment of this unusual transaction. The trial court excluded both.

The Fifth Circuit reversed, holding that both sides should be allowed to introduce their respective expert testimony. The expert testimony was relevant to the question of intent, since

the ambiguity in the law was directly relevant to whether the taxpayer "willfully" failed to report income:[3]

> In a case such as this where the element of willfulness is critical to the defense, the defendant is entitled to wide latitude in the introduction of evidence tending to show lack of intent. . . .
>
> By disallowing Nall's [defendant's expert] testimony that a recognized theory of tax law supports Garber's feelings, the court deprived the defendant of evidence showing her state of mind to be reasonable.

Id. 607 F.2d at 99.

There was no indication that this open approach caused any problems. Nonetheless, the Fifth Circuit has reversed course and limited its holding in Garber to "its bizarre facts". Now, the Fifth Circuit repeatedly and consistently affirms the exclusion of defendant's expert testimony, though it does not claim to have overruled Garber. United States v. Herzog, 632 F.2d 469, 473 (5th Cir. 1980); United States v. Daly, 756 F.2d 1076, 1083 (5th Cir.), cert. denied, 474 U.S. 1022 (1985); United States v. Burton, 737 F.2d 439, 443-444 (5th Cir. 1984).[4]

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[3]Because the statutes only prohibit "willful" evasion of taxes, a bona fide misunderstanding of the tax law is a complete defense in a criminal prosecution. United States v. Pomponio, 429 U.S. 10, 97 S.Ct. 22, 50 L.Ed.2d 12 (1976); United States v. Murdock, 290 U.S. 389, 396, 54 S.Ct. 223, 78 L.Ed. 381 (1933).

[4]Curiously, none of these Fifth Circuit decisions mention this Court's decision in United States v. Johnson, 319 U.S. 503, 63 S.Ct. 1233, 87 L.Ed. 1546 (1943). They never attempt to reconcile the inconsistency that the Government can use an expert witness on the tax law, but the defendant can not.

In refusing to follow Garber, the Fifth Circuit has given lip service to the rule that the introduction of expert testimony is committed to the discretion of the trial court. However, having said that, the Fifth Circuit then announces directions that warn the trial courts not to admit this type of evidence from defendant's experts. In Daly, supra, the Fifth Circuit cautioned the trial courts to remember that "the expert's testimony on plausible readings of the Internal Revenue Code can be easily outweighed by considerations of potential prejudice and of confusing the jury, especially considering that the judge is the jury's sole source of information regarding the law." Daly, supra, 756 F.2d at 1083.

Similarly, in Burton, the Fifth Circuit warned trial courts, "Testimony such as that offered by Burton's "expert" is not admissible as an explication of plausible readings of the statutory language . . ." Burton also repeats the admonition that the trial judge "remains the jury's source of information regarding the law."[5] Burton, supra, 737 F.2d at 443. Considering these warnings, trial courts simply exclude the defendant's expert testimony and are always affirmed by the Fifth Circuit.

Other Courts of Appeals have attempted to follow the Fifth Circuit's lead, but have ended up in disarray. The Eleventh Circuit seems to hold more closely to the original Garber decision. In United States v. Heller, 866 F.2d 1336, 1342 (11th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct 71 (1990), the Eleventh Circuit suggested that a tax evasion defendant should be allowed to introduce independent documentary proof on the status of the tax law. The Eleventh Circuit believes that such materials are relevant to the defendant's intent:

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[5]Of course, the Fifth Circuit is wrong when it claims that the judge is the jury's sole source of the law. As seen above, the IRS agents are always allowed to tell juries their opinions on the application of tax law.

> One way for appellee to demonstrate lack of intent would be to point to a Tax Court decision, an IRS opinion, or some authoritative statement that arguably condones activities similar to theirs for ends similar to theirs. If appellees produce such a statement, the district court may in its discretion admit it into evidence . . .

On the other hand, the Tenth Circuit, following the Fifth Circuit's later decision in Burton, rejected the notion that a defendant could introduce documentary proof (such as a Supreme Court opinion), even if the defendant relied on these materials in forming his opinions about the tax law. United States v. Harrold, 796 F.2d 1275, 1285 (10th Cir. 1986):

> Several courts have held that Supreme Court opinions or other evidence on which a defendant relied to reach an erroneous conclusion on tax obligations properly are excluded.

The rationale cited in Harrold, supra, was that the introduction of various tax materials into evidence would confuse the jury. Id. 796 F.2d at 1285.

The Second Circuit has likewise affirmed the exclusion of defendants' expert witnesses. United States v. Ingredient Technology Corp., 698 F.2d 88, 97 (2nd Cir.), cert. denied, 462 U.S. 1131 (1983). Like the Tenth Circuit, the Second Circuit based its decision on the rationale that such materials would confuse the jury.

This rationale defies logic. As seen above, the IRS agents are always allowed to give their expert opinion on the application of tax law. Does this confuse the jury? Apparently the Courts of Appeals believe that its only confusing to the jury if the defendant is the one offering the testimony. Admittedly, law suits are much less confusing when

only one side is allowed to present its evidence. However, a certain element of fairness seems to be lost.

Furthermore, when it comes to the Internal Revenue Code, sometimes reality is confusing. Of fifty national experts tested recently, no two could agree on the proper amount of tax for a family of four (although this is a relatively simple calculation when compared to the very complex code sections involved in this case). App. Pg 71 To save the jury from confusion is to save the jury from the reality that tax law is sometimes very confusing.

E. Judges Should Not Become Witnesses In The Case.

The cases that favor exclusion of the expert's testimony also state that the court, not an expert witness, should be the jury's sole guide on the law. United States v. Harrold, 796 F.2d 1275, 1285 (10th Cir. 1986) and United States v. Ingredient Technology Corp., 698 F.2d 88, 97 (2nd Cir. 1983).

While this sounds like a simple rule, it quickly breaks down in practice. As seen above, following this Court's holding in United States v. Johnson, the Courts of Appeals always allow the IRS agents to tell the jury about the application of the tax law. Under the current practice, the judge is not the jury's sole source of information regarding the tax law.

Furthermore, as we have seen, often the law is confusing. If the trial judge reviews the existing case law (with conflicting decisions, dissents, exceptions and limitations) and only tells the jury his final conclusion, the relevance to the defendant's state of mind is lost. That is precisely what happened at trial in United States v. Garber, 607 F.2d 92 (5th Cir. 1979) (en banc). The law was confusing on whether payments for donating blood plasma were income. The trial court took it upon himself to reconcile the different authorities and resolve the issue. He excluded the experts and told the jury only his final result. It was income. The jury convicted with no

knowledge of the difficulty of the issue. They had no context in which to weigh the defendant's claim that she acted in good faith.

If the trial judge is going to be the jury's sole source of the law then, to avoid the false appearance of simplicity, the trial judge will need to give the jury a subjective analysis of the law. Something like, "Here is how the tax law applies to these facts, but I'm not positive, because there are two schools of thought" or "Ladies and Gentlemen, I'm going to tell you the law as finally determined by the Supreme Court of the United States. However, the Supreme Court voted 5 to 4, so at least four of the most brilliant legal minds in this country do not agree with what I'm about to say." If we are going to have subjective analysis, then it should come from the witnesses, as this Court approved in United States v. Johnson. The judge should not become a witness in the case.

Furthermore, in the case of John Worley, the trial judge gave the jury no instructions whatsoever on commodities straddles utilizing foreign non-controlled corporations. John Worley tendered jury instructions on foreign non-controlled corporations, but the trial judge refused to submit them to the jury. App. Pg 69 Thus, the jury had no guidance whatsoever in judging John Worley's legal opinion.

II. The Exclusion Of Expert Testimony In This Case Deprived John Worley Of a Fair Trial.

In determining John Worley's mental intent (i.e. whether he was acting in good faith or with conspiratorial motives) it is essential to know whether John Worley's legal opinion was reasonable. Was this a crazy legal opinion that no reasonable tax lawyer could hold or was this a reasonable opinion shared by other tax lawyers? In order to show that John Worley's opinion was well founded (and that he therefore lacked a conspiratorial intent), he attempted to call Professor William E. Streng as a witness. Professor Streng now teaches tax

(including international taxation) at the University of Houston Law Center. His background is impressive. He was once the partner in charge of the tax department at Bracewell & Patterson, a large Houston law firm. Prior to that he had been deputy counsel at the Export-Import Bank, which is engaged in international financial transactions. He authored the multi-volume set, International Planning: Law and Taxation, published by Matthew Bender.

A. Professor Streng's Testimony Supported John Worley's Opinion On The Tax Effect of Commodities Straddles.

Outside the presence of the jury (in an offer of proof), Professor Streng testified about commodities tax shelters utilizing non-controlled foreign corporations, such as the Cayman Islands corporations involved in this case. It is significant that he did not try to confuse the issue by throwing out legal mumbo jumbo. He simply rendered an opinion that a reasonable tax lawyer, in 1983, could have shared John Worley's opinion on commodities tax straddles:

Q. Are you aware from your knowledge and experience . . . regarding commodities trading activities being done in the context of the United States tax planner and a non-controlled foreign corporation?

A. (By Professor Streng) Yes. I am aware that during the early 1980's, particularly, some individuals planned transactions so that in a straddle environment one component of the transaction would occur in the United States and perhaps one component outside the United States.

Q. . . . Why was that being used, to your knowledge? What tax advantage? What tax consequence would that have?

A. Well, if the U.S. component produced a loss and the non-U.S. component produced a gain, then the loss would be currently available on the U.S. party's income tax return.

But the gain, as we've discussed, would be postponed, because it was in a non-controlled foreign corporation.

Later in the offer of proof Professor Streng testified:

"Q. . . . [I]f a lawyer was presented with a set of facts in, say, 1983 . . . that the taxpayer would be entering into a trading situation through a commodities trading company such as ContiCommodity . . . and if there was a non-controlled foreign corporation that was taking the -- that was going to be taking the opposite side of the trade, and you were asked in 1983 whether or not that could be done based on the hypothetical presented to you that it would be done, would it be reasonable, a reasonable state of mind, for that attorney to -- who had some knowledge of the tax law or did some research on the tax law -- to form an opinion that it can be done in a legal way?

A. My opinion is that, yes, it would fit within the technical requirements of the tax law at that time. Again assuming, of course, that the foreign corporation was a non-controlled foreign corporation.

Professor Streng's testimony was elicited by John Worley's counsel, Tom Mills. The testimony was specifically directed at

defending the reasonableness of John Worley's tax opinion as a tax lawyer under the then existing tax law. Thus, the questions were phrased, "Would it be unreasonable . . . for a lawyer who was presented with that set of facts to form an opinion that such a tax planning strategy could be done legitimately under the tax law and regulations." Professor Streng replied, "I think it would be reasonable."

Not surprisingly, after cross-examining this expert, Counsel for the Government stated to the Court that, "the Government respectfully disagrees with some of the answers that Mr. Streng has given with regard to how the law applies in this instance."

That is precisely the point! John Worley intended to prove that reasonable tax lawyers disagreed with the Government's interpretation of the law in this case.

The trial court excluded Professor Streng's testimony. This ruling totally eclipsed John Worley's defense. Perhaps the best analysis is by analogy: A doctor is accused of committing murder by willfully causing the death of a patient during surgery. At trial, he should be allowed to call another doctor to testify that a reasonable surgeon would have used the same techniques utilized by the defendant doctor. If the defendant doctor simply did what any doctor would do, then he has not committed murder, even if the patient died. Similarly, a tax lawyer accused of willfully violating the law should be allowed to prove that his opinion was reasonable at the time that it was given.

B. The Court Of Appeals Was Mistaken In Holding That Professor Streng's Testimony Was Irrelevant.

The Fifth Circuit acknowledged in its Opinion that commodities straddles were once commonly used in "tax deferral plans" in the 1970's. It even went so far as to say:

> Uncertainty in the application of the law relative to legitimate commodities straddles might be relevant to the

willfulness element of the substantive offense. Had the jury been required to assess such an uncertainty, expert testimony might have proven helpful. In such a setting the denial of that evidence likely would have been an abuse of discretion. But that, however, is not the situation in the case at bar.

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Why was the expert testimony irrelevant in this case? It was because the Fifth Circuit found that these were not true commodities shelters. They were really faked transactions with "assigned" losses. However, John Worley testified that he did not know they were faked transactions. He believed they were real commodities straddles. The government's witnesses confirmed this. Ron Williams testified, "I don't know of any way that John knew that the trades were done unlawfully."

At this point in the analysis, the Fifth Circuit made a critical mistake in confusing two different types of standards for review. Since it was also reviewing the sufficiency of the evidence to sustain the convictions, it was resolving all disputed inferences against John Worley. Thus, the Fifth Circuit decided that there was sufficient evidence to infer that John Worley did know these were sham transactions with no real trades.[6]

While resolving all inferences in favor of the Government is correct in a sufficiency of the evidence review, it is patently

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[6]The Fifth Circuit simply makes a factual mistake in claiming that John Worley attended a meeting in the Cayman Islands where the real workings of the commodities trades were revealed. Unfortunately, the Fifth Circuit gives us no clue as to who supposedly said this or when the meeting supposedly occurred. In order to taint his legal advice given in November 1983, he would have had to attend such meeting prior to such date. Suffice it to say that there is simply no such evidence of any meeting of this sort.

erroneous in a relevance review. This is best demonstrated by analogy. A defendant is accused of robbing a bank. The government's witness identifies the defendant as the man who robbed the bank. The defendant claims that, at that time, he was in another city. He calls three witnesses to the stand to confirm the alibi. If the trial court resolves all inferences in favor of the government (that the defendant did rob the bank), then it will exclude the testimony of the three alibi witnesses. Resolving all inferences in favor of the government is fatally wrong in judging the relevance of the evidence.

C. Tax Law Concerning Commodities Straddles Was Open To Interpretation.

In 1983, when John Worley rendered his opinion, tax shelters using commodities straddles were the subject of a four way battle between the Tax Court, the IRS, the Courts of Appeals, and Congress. A "straddle" in commodities means that the investor has taken a "long" position in one month and a "short" position in the next month. Regardless of which way the market moves, one position ("leg") will produce a gain and one leg will produce a loss.

The tax issue in debate was whether the "loss leg" of the straddle can be taken as a deduction, since there was an original intent to create a tax deductible loss in that leg of the straddle. Viewing the "loss leg" in isolation, the profit motive (necessary for most deductions) is lacking. However, viewing both legs of the straddle (including the "profit leg"), there is at least some "profit motive" in the transaction. But is that enough profit motive? Here the battle intensifies. For a sample of the complexity of this area, we turn to the Ninth Circuit's review of this ten year dispute. In Landreth v. Commissioner of Internal Revenue, 859 F.2d 643, 644-648 (9th Cir. 1988) the Court reviewed the history of the dispute. It first issued one opinion (845 F.2d 828), then reversed itself on

rehearing. For the sake of brevity, only the highlights are quoted here:

> Before section 108 was enacted in 1984, it was unclear when a taxpayer could deduct the losses from a commodity futures straddle. In 1977, the IRS took the position that losses on one leg of a straddle were not completed transactions and thus could not be realized until the taxpayer disposed of the other leg . . .
>
> The Tax Court rejected this view and went on to hold that a taxpayer could not realize a loss in year one unless he could show that the straddle transaction was "entered into for a profit" under section 165(c)(2) . . .
>
> Because the IRS continued to litigate the issue, Congress became concerned about the volume of litigation arising from the conflict between the IRS and the Tax Court . . . Accordingly, in 1984 Congress adopted section 108 for all straddles entered into before 1982 . . .
>
> Although section 108 resolved the conflict over <u>when</u> the losses on one leg of a straddle could be deducted, its language presented a new question, namely the meaning of "entered into for profit."
>
> [A] sharply divided Tax Court held that the "entered into for profit" language of section 108 was sufficiently ambiguous to warrant study of the legislative history. . . After reviewing this legislative history, the Tax Court in <u>Miller</u> concluded that section 108 dispensed with the subjective "primarily for profit" standard . . .
>
> The Tenth Circuit has since reversed the Tax Court . . . reasoning that the language of section 108 - "entered into for profit" - is unambiguous. . .

> In 1986 Congress retroactively amended section 108 to expressly distinguish between straddle transaction losses incurred in a trade or business and all other transaction losses.
>
> Finally, we believe that the 1986 amendments have undermined Wehrly [the Ninth Circuit's previous holding which had followed the Tax Court's holding in Miller] because they clarify that the "entered into for profit" language in section 108 should be interpreted in the same way as the identical language in section 165(c)(2).
>
> We therefore reverse the Tax Court's decision in this case that because taxpayers "had a reasonable prospect of some profit for the overall transactions," they may deduct losses from the straddle transactions.

John Worley rendered his tax opinion in 1983, during the beginning of this entire dispute, and long before the Ninth Circuit "ironed out" the problem in the Landreth case in 1988.

Unfortunately, the jury was completely ignorant of this legal dispute. Professor Streng was entirely correct when he concluded that, looking at the law as it existed in 1983, a reasonable tax lawyer might come up with a view that the loss from the straddle would be deductible. Unfortunately, the jury never got to hear this evidence.

D. The Jury Could Not Rely On Their Common Knowledge.

Under Federal Rule of Evidence 702, the test of whether expert testimony should be admitted is whether it "will assist the trier of fact to understand the evidence". As this Court has previously determined, it is not error to exclude expert testimony on subjects that are susceptible to the common

knowledge of the average juror. Salem v. United States Lines Co., 370 U.S. 31, 37 footnote 6, 82 S.Ct. 1119, 87 L.Ed.2d 313 (1962). This has become the accepted test for admissibility of expert testimony. United States v. Edelman, 873 F.2d 791 (5th Cir. 1989) and United Telecommunications, Inc. v. American Television & Communications Co., 536 F.2d 1310, 1317 (10th Cir. 1976).

Judged by that standard, the exclusion of Professor Streng's testimony was error. It would be hard to imagine a more complex area (totally removed from the realm of common knowledge of the average juror) than the application of the Internal Revenue Code to a transaction involving commodities straddles and foreign non-controlled corporations. The jury could hardly be expected to draw on their own life experiences. Without the guidance of an expert, the jury was shooting in the dark.

E. There Was A "Nexus" Between The State Of The Law And John Worley's State Of Mind.

The Ninth Circuit has come up with an good test for whether an ambiguity in the law is relevant to a defendant's state of mind. In United States v. Brodie, 858 F.2d 492, 496 (9th Cir. 1988) the Ninth Circuit held that the defendant must establish some "link" (sometimes called a "nexus") between the proffered expert opinion on the law and the defendant's state of mind.

In the prosecution of a tax lawyer for rendering a legal opinion, there will almost always be a nexus between the state of the law and the lawyer's state of mind. The record before this Court clearly demonstrates the nexus. John Worley testified that he researched the applicable code sections pertaining to the commodities trading. Ron Williams (the Government's own witness) confirmed that John Worley researched the tax law in order to determine the "viability of these tax shelters." Thus, the Government's own evidence

established the link between the complex state of the law and John Worley's state of mind.

The jury's letters to the Judge demonstrate that they too realized there was a link between the state of the law and John Worley's intent. In requesting that the Judge not sentence Worley to any time in prison, the jury told the Judge, "He [Worley] was just not as careful as his legal training should have made him." Apparently the jury believed that, having been taught the tax law, John Worley should have known better. Unfortunately, the jury reached that conclusion without the benefit of the testimony of a distinguished law professor, Mr. Streng. He would have told the jury that a reasonable tax lawyer, after reviewing the law as it existed in 1983, would have concluded that the commodities transaction with the foreign corporation would be legitimate under the tax law and regulations.

F. The Exclusion Of Professor Streng's Testimony Went To The Heart Of John Worley's Case.

The final test for determining whether the exclusion of an expert was error is the consideration of how important the expert opinion was in the defendant's case. In Murphy v. Magnolia Elec. Power Assn., 639 F.2d 232, 235 (5th Cir. 1981), the court reversed the exclusion of an electrical engineer in a case involving electrocution. It was reversible error because the exclusion "struck at the heart of appellants' case." Id. at 639 F.2d 235.

The courts have recognized that in some cases expert testimony is essential. If the defense of a indigent criminal defendant requires the services of an expert, then the Constitution requires that the Government provide funds for the hiring of such an expert. Without the expert, the defendant lacks the effective assistance of counsel. Williams v. Martin, 618 F.2d 1021, 1025 (4th Cir. 1980).

With these holdings in mind, it is clear that the exclusion of Professor Streng's testimony was error. The only factual allegation in the Indictment of John Worley was that he counseled the preparation of a false income tax return by saying the commodity loss would be deductible. John Worley never denied meeting with the Kaplans and rendering a legal opinion about the legality of the proposed transaction. His defense was based on the argument that, even if his opinion on the law turned out (in hindsight) to be wrong, he had a good faith basis for rendering the opinion at the time that he did.

The first question that comes to anyone's mind in this type of case is whether John Worley rendered some "off the wall" tax-protestor legal opinion (like wages are not income) or the type of reasonable legal opinion that was shared by other competent lawyers. The ultimate defense of a legal opinion is that it is commonly held by distinguished members of the legal community. Without that information, the jury had absolutely no context within which to evaluate John Worley's defense that he honestly believed his legal opinion.

CONCLUSION

A writ of certiorari should be granted.

Respectfully submitted,

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OPINION OF THE 5TH CIRCUIT COURT OF APPEALS

UNITED STATES of America,
Plaintiff-Appellee,

v.

James G. BRYAN, James A. Hearn,
Eugene R. Jackson, John Worley,
and Julian Malcomson, Defendants-
Appellants.

Nos. 88-1327, 87-1962

United States Court of Appeals,
Fifth Circuit.

Feb. 22, 1990

After motion of one defendant to dismiss charge on double jeopardy grounds was denied, 677 F.Supp. 482, defendants were convicted in the United States District Court for the Northern District of Texas, Robert B. Maloney, J., of conspiracy to defraud the Government and willfully aiding and assisting in the preparation of false tax returns and they appealed. The Court of Appeals, Politz, Circuit Judge, held that: (1) Oregon indictment charging defendant with conspiracy to defraud the Government covered the same conspiracy involved in the instant indictment, so that instant prosecution was barred on double jeopardy grounds; (2) venue was proper; (3) there was no variance between indictment and evidence; and (4) evidence was sufficient to sustain convictions.

Affirmed in part and reversed and remanded in part.

Phil Pollan, John Dee Evans, Dallas, Tex., court-appointed for Hearn.

David M. Pruessner, Thomas W. Mills, Jr., Dallas, Tex., for Worley.

Marvin Collins, U.S. Atty., Ft.Worth, Tex., Jack Curtis Williamson, Asst. U.S. Atty., David G. Barger, Dept. of Justice, Tax Div., Crim. Section, David Farnham, William S. Rose, Jr., Attys., Karen M. Quesnel, Gary R. Allen, Chief, Appellate Section, Robert E. Lindsay, Washington, D.C., for U.S.

Joseph A. Hoffman, Dallas, Tex., court-appointed for Eugene R. Jackson.

Ronald Owen Holman, Dallas, Tex., Court-appointed, for Julian Malcomson.

Bennett A. Midlo, Vinson & Elkins, Houston, Tex., court-appointed, for James G. Bryan.

Appeal from the United States District Court for the Northern District of Texas.

Before Goldberg, Politz and Jones, Circuit Judges.

POLITZ, Circuit Judge:

James G. Bryan, James A. Hearn, Eugene R. Jackson, Julian Malcomson, and John Worley challenge their convictions for various violations involving the promotion and sale of fraudulent tax shelter schemes. With the exception of the double jeopardy challenge made by Bryan to the conspiracy count, 677 F.Supp. 482, we affirm. We remand Bryan's double jeopardy challenge for entry of an order of dismissal as discussed herein.

Background

A grand jury for the Northern District of Texas returned an indictment in April 1987 charging 22 defendants, including the five appellants, with illegal activities resulting from their involvement in the promotion and sale of fraudulent tax shelters. All defendants were charged with conspiring to defraud the government by impeding the lawful operation of the Treasury Department, 18 U.S.C. Section 371. All defendants except Malcomson were charged with various

counts of willfully aiding and assisting in the preparation or presentation of false tax returns, 26 U.S.C. § 7206(2). Appellants were tried to a jury which returned verdicts of guilty on all counts against all defendants.

The indictment charges that in 1981 Bryan formed the United States Tax Planning Service (USTPS) and devised a variety of tax shelters which, in effect, crossed the line separating tax avoidance from tax evasion. The tax schemes were marketed at seminars and were sold by USTPS offices and licensees throughout the nation. The schemes were based on the creation of false income tax deductions through the fraudulent: (1) contributions to the Congregational Church of Human Morality; (2) purchases of malpractice and other insurance from the Professional Liability Insurance Corporation; and (3) use of commodities straddles. The program involved channeling the transactions through a tax-friendly country, usually the Cayman Islands, the creation of a false paper trail of invoices and receipts, and the return to the client-taxpayer of the sums involved, less the fees paid to USTPS.

At various times and in various capacities, Hearn, Jackson, Malcomson, and Worley joined in the development, promotion, and sale of the schemes. Hearn, an accountant, operated the Dallas USTPS office, later known as Worldwide Capital Management (WCM). Worley, an attorney, worked at the Dallas office. Jackson was a broker with Conti-Commodities Services, Inc., and had significant contact with the Dallas office. Malcomson operated the USTPS franchise in St. Paul, Minnesota.

Analysis

I. Double Jeopardy

Appellants raise multiple issues on appeal. We first address the one issue which merits a reversal, Bryan's plea of double jeopardy.

In March 1985 a grand jury for the District of Oregon handed up a 51-count indictment charging Bryan and three others with, inter alia, conspiracy to defraud the United States by impairing and impeding the lawful functions of the Treasury Department, 18 U.S.C. § 371. Bryan was convicted on all counts. In January 1989 the Ninth Circuit Court of Appeals vacated Bryan's convictions and remanded the case for a determination whether he improperly was denied access to certain documents. United States v. Bryan, 868 F.2d 1032 (9th Cir.) cert. denied ___ U.S. ___, 110 S.Ct. 167, 107 L.Ed.2d 124 (1989).

The instant indictment charges Bryan and 21 other defendants with, inter alia, conspiracy to defraud the United States by impairing and impeding the lawful functions of the Treasury Department, 18 U.S.C. § 371. Both indictments also charge tax fraud in violation of 26 U.S.C. § 7206(2); the Oregon indictment has 28 counts of tax fraud, the Texas indictment contains 24 such counts.

The Oregon indictment covers the period from the mid-1970's until December 31, 1984; the Texas indictment charges a conspiracy from the beginning of 1981 until the end of 1985.

Bryan moved for dismissal of the present conspiracy count, urging that the double jeopardy clause of the fifth amendment prevents his retrial on the conspiracy cont. The district court denied his motion but severed Bryan's trial on the conspiracy count and stayed that action pending the appeal. We consolidated Bryan's appeal from the ruling on the double jeopardy motion with his appeal on the merits.

[1] Whether the constitutional prohibition against twice placing a person in jeopardy bars the instant conspiracy indictment is determined by deciding whether the two indictments charge separate and distinct conspiracies, or two parts of the same conspiracy. We have developed guidelines and procedures to assist us in that determination. In United States v. Stricklin, 591 F.2d 1112 (5th Cir.), cert. denied, 444 U.S. 963, 100 S.Ct 449, 62 L.Ed.2d 375 (1979), we held that

once a defendant establishes a prima facie nonfrivolous double jeopardy claim the burden shifts to the government to demonstrate by a preponderance of the evidence that the indictment charges a crime separate from that for which the defendant previously was placed in jeopardy. The district court found that Bryan made the requisite showing, but concluded that the government had established by a preponderance of the evidence that he was involved in two separate conspiracies to defraud the United States with his tax schemes.

[2] The essential issue in a double jeopardy analysis involving conspiracy is whether one, or more than one, agreement existed, United States v. Levy, 803 F.2d 1390 (5th Cir.1986). The Supreme Court has long recognized that multiple conspiracies require multiple agreements. Braverman v United States, 317 U.S. 49, 63 S.Ct. 99, 87 L.Ed. 23 (1942). In United States v. Marable, 578 F.2d 151, 154 (5th Cir.1978), we enumerated five factors to be considered in the single/multiple agreement analysis:

> (1) the time-frames of the charged conspiracies; (2) the persons acting as conspirators; (3) the statutory offenses charged in the indictments; (4) the overt acts charged by the government or any other description of the offense charged which indicates the nature and the scope of the activity which the government sought to punish in each case; and (5) places where the events alleged as part of the conspiracy took place.

[3] Viewing the facts of record in light of the Marable factors we are persuaded that Bryan was involved in one continuous conspiracy. An examination of the time factor reveals a significant overlap of four years. The cast of characters changes but Bryan remains the central and essential figure in both indictments. The Oregon indictment named Bryan and three others. Two of those are joined with Bryan

and 19 others in the subsequent Texas indictment. The government leans heavily on the 19 other defendants indicted in Texas to establish a sufficient dissimilarity. The government attempts to shift the focus of our inquiry from an exploration of the nature of the agreement to a body count. This we decline to do, but instead echo our earlier observation that when considering the single versus multiple conspiracy conundrum, "[w]hether one uses similes of wheels, hubs, or spokes, the results should be the same. A mere shuffling of personnel in an otherwise on-going operation with an apparent continuity will not, alone, suffice to create multiple conspiracies." United States v. Nichols, 741 F.2d 767, 772 (5th Cir.), cert. denied, 469 U.S. 1214, 105 S.Ct. 1186, 84 L.Ed.2d 333 (1985).

As to the third factor, the similarities in the statutory offenses are obvious. In addition to alleging violations of the identical statutes, the overt acts charged are markedly similar, if not identical. Both indictments target a single conspiracy to sell illegal tax schemes and they detail marketing seminars, the deposit of funds in the Cayman Islands, and the formation of various business entities to facilitate the activity. Finally, there are parallels in the locations of the activities, to-wit, seminars held in several United States cities and the routing of funds through financial institutions in the Cayman Islands. We conclude that the two indictments charge separate parts of one conspiracy.

[4] That conclusion ends our double jeopardy inquiry notwithstanding that the convictions under the Oregon indictment were vacated and remanded to the district court with instructions to review for possible breaches of Brady v. Maryland, 373 U.S. 83, S.Ct. 1194, 10 L.Ed.2d 215 (1963), and/or Fed.R.Crim.P. 16(a)(1)(C). The Oregon district court may order a new trial; or it may find neither a Brady nor rule violation, in which event it might decide to reinstate the convictions. Under either scenario, Bryan would have been placed in jeopardy for conspiracy by the Oregon indictment,

therefore, he cannot again be placed in jeopardy for that conspiracy.

II. Venue

[5-7] The next issue raised is a challenge to venue. Bryan contends that the 13 substantive counts charged in the indictment should be dismissed for lack of proper venue, correctly recognizing that an accused has the right to be tried in the district in which the alleged crime was committed. U.S. Const. amend. VI; Fed.R.Crim.P. 18. When challenged, the government has the burden of establishing venue by a preponderance of the evidence. United States v. Parish, 736 F.2d 152 (5th Cir.1984). In the case at bar the government has acquitted that evidentiary burden. The challenged counts charge Bryan with knowingly and willfully aiding and assisting in the preparation or presentation of fraudulent tax returns in violation of 26 U.S.C. § 7206(2). By virtue of 18 U.S.C. § 3237(a), venue properly lies where a false statement is prepared and signed, even though received and filed elsewhere. United States v. Slutsky, 487 F.2d 832, 839 (2d Cir.1973). The tax returns described in Counts 2, 3, 5, 6, 7, 8, 14, 21, and 25 were prepared by Tom Garner and Associates, Inc. whose address is shown as 8035 E. R.L. Thornton Freeway, Suite 610, Dallas, Texas 75228. Similarly, the offenses charged in Counts 4, 16, 22, and 23 were begun, continued, or completed within the Northern District of Texas. Bryan is accused of providing the false documents and information which facilitated the preparation of these returns. He properly is charged with aiding and assisting in the preparation of false tax returns in the Northern District of Texas. United States v. Slutsky. Venue is proper herein.

III. Expert Testimony

The trial court excluded the tendered expert testimony of Dr. William E. Streng, which was proffered by the defendants to establish that some confusion existed relative to the tax

treatment to be accorded to commodities transactions. By this defendants would challenge the willfulness element require by 26 U.S.C. § 7206(2).

[8,9] The decision to admit or exclude expert testimony is entrusted to the discretion of the trial court. Jon-T Chemicals, Inc. v. Freeport Chem. Co., 704 F.2d 1412 (5th Cir.1983). We find no abuse of discretion. The tax shelters devised by Bryan and promoted by Hearn, Jackson, and Malcomson were sham transactions lacking a valid business purpose. The evidence reflects that in many cases there were no actual trades, but only prearranged transactions in a non arm's-length setting guaranteeing a loss, or the simple assignment of a loss.

In certain cases uncertainty in the application of the law relative to legitimate commodities straddles might be relevant to the willfulness element of the substantive offenses. Had the jury been required to assess such an uncertainty, expert testimony might have proven helpful. In such a setting the denial of that evidence likely would have been an abuse of discretion. But that, however, is not the situation in the case at bar.

There are significant differences between the commodities straddles used as tax deferral plans in the 1970s and the prearranged commodities shams presented in this case. In a traditional straddle one commits to either deliver or receive a specified quantity of a commodity on a future date at a price fixed by the participants. One committing to deliver pursuant to a futures contract is a seller and has a short position; one committing to receive is a buyer and has a long position. A straddle is established by simultaneously holding a long position in one delivery month and a short position in another delivery month. The key to the straddle is to liquidate to the loss-bearing position in the first tax year in which the taxpayer needs offsets to other gains, and defer the gain-bearing position to the following tax year.

By contrast, the commodities shams devised by Bryan were prearranged transactions which permitted the taxpayer to purchase a taxable loss at no actual risk. Further, in some instances foreign corporations were used to hide the gain in the short leg of the transaction. In addition, there was evidence that, in some instances, there were no actual trades but only the creation of paperwork to document fictitious trades.

In that setting, the trial court did not abuse its discretion in declining to permit expert testimony about the legal status of legitimate straddles.

[10] The court also properly excluded expert opinion relative to other tax schemes, absent a showing that any of the defendants relied thereon. United States v. Daly, 756 F.2d 1076 (5th Cir.), cert.denied, 474 U.S. 1022, 106 S.Ct. 574, 88 L.Ed.2d 558 (1985). There is no support in the record for the proposition that any defendant relied on the advice or opinions of Dr. Streng, or of any other expert agreeing with his views, relative to the validity of deductions ostensibly generated by contributions to the Congregational Church of Human Morality, or for payment of insurance premiums to the Professional Liability Insurance Corporation. Indeed, the record contains testimony which the jury was free to credit, reflecting that the defendants were aware when they acted that the tax schemes were illegal.

IV. Variance Between Indictment and Evidence

[11] Two of the defendants, Hearn and Jackson, maintain that certain of their convictions must be reversed because there is a variance between the indictment and the proof offered at trial. A variance, warranting reversal, exists when the evidence establishes facts different from those alleged in the indictment. Dunn v. United States, 442 U.S.100, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979). The indictment charges fraud arising from sham commodities transactions. The evidence

reflected trading in treasury-bill (T-Bill) futures. Hearn and Jackson contend that T-Bills are not and cannot be said to be commodities. Although we do not necessarily disagree with that proposition, we reject it as relates to trades in T-Bill futures.

[12] Albeit the traditional commodities futures markets involve items such as corn, wheat, soybeans and pork bellies, in recent years the commodities futures markets have developed trading capabilities in contracts for T-Bills and foreign currency. The Commodity Futures Trading Commission Act of 1974, Pub.L. No. 93-463 (codified in 7 U.S.C. § 1-24 (1982), expanded the definition of a commodity to include: "...all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in." Courts confronting the issue have recognized that all futures contracts are regarded as commodities regardless of whether that which is deliverable to the futures contract is commonly thought of as a commodity. Messer v. E.F. Hutton, 847 F.2d 673 (11th Cir. 1988), and Conroy v. Andeck Resources, 137 Ill.App.3d 375, 92 Ill.Dec.10, 484 N.E.2d 525 (1985). Futures contracts to buy T-Bills are thus the same as futures contracts to buy wool.

[13] Additionally, several witnesses testified that Hearn and his associates at WCM designed and sold "commodities programs" as part of the clients' tax plans. Witnesses also testified that Jackson had been involved actively in the execution of their commodities transactions. The government's proof that Hearn and Jackson promoted and sold commodities schemes involving futures contracts in T-Bills is not in variance with the indictment.

V. Worley

Upon initial consideration the argument of John Worley that he merely acted as an attorney who provided tax advice,

and that he did not conspire to commit tax fraud or any other criminal offense appeared to have merit. But that contention did not withstand a close examination of the evidence, viewed through the lens which an appellate court must use in reviewing a jury's action. We have long recognized that "it is not for us to weight the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government to support it." United States v. Williams, 809 F.2d 1072, 1094 (5th Cir.), cert. denied, 484 U.S. 896, 108 S.Ct. 228, 98 L.Ed.2d 187 (1987), (quoting Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680, 704 (1942). Measuring the prosecutor's evidence against this backdrop, we conclude that the record supports Worley's conviction.

[14,15] Worley's participation went beyond the mere rendering of tax advice. Witnesses testified that he spoke at Balliett seminars to generate clients for WCM and that he attended licensee seminars at which the tax schemes were discussed. One witness attested to a seminar in the Cayman Islands, attended by Worley, where it was disclosed that the commodities transactions would involve the assignment of losses to the taxpayer and the gains to a foreign company so as to generate a taxable loss on paper. Hearn and a WCM employee testified that they had explained to Worley the operation of the foreign corporations and that they had discussed the various methods to secretly return offshore gains to a client. Worley participated in the decision to create an offshore corporation for the clients and discussed how to avoid discovery or tracing through postal cancellations markings. It was not necessary that Worley sign or actually prepare a tax return in order to be guilty of willfully aiding and assisting in the preparation of false returns. United States v. Wolfson, 573 F.2d 216 (5th Cir. 1978). It is well settled that 26 U.S.C. § 7206(2) does not apply solely to tax return preparers. From

the evidence adduced the jury reasonably could infer that Worley willfully aided and assisted in the preparation of a false return.

VI. Jackson

[16] Jackson maintains that there was insufficient evidence to support his conviction of conspiracy and of the substantive counts. The record does not support his contention. Testimony reflected that Jackson was more than a mere bystander to the commodities transactions. He traveled to the Cayman Islands to meet Bryan. He spoke at USTPS client seminars. In addition, he lectured at licensee seminars about commodities futures markets, and referred clients for tax planning services. One WCM employee testified that Jackson knew and understood all aspects of the commodities transactions. Clients sent their funds for the commodities programs directly to Jackson. Moreover, one client personally delivered $55,000 to Jackson. The record contains sufficient evidence to support the verdicts as to Jackson.

Finally, Jackson maintains that his trial should have been severed because he was only involved in the commodities transactions and, accordingly, he was prejudiced by evidence of other violations.

We begin by reminding of the general rule that persons indicted together are to be tried together. United States v. Harrelson, 754 F.2d 1153, 1174 (5th Cir.), cert. denied, 474 U.S. 908, 106 S.Ct. 277, 88 L.Ed.2d 241; 474 U.S. 1034, 106 S.Ct. 599, 88 L.Ed.2d 578 (1985). District courts have the discretion to order a severance "[i]f it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants...." Fed.R.Crim.P. 14. Absent an abuse of discretion, the decision of the district court will not be disturbed.

[17] To demonstrate an abuse of discretion by the district court Jackson must establish "that he was unable to obtain a

fair trial without severance and that he suffered compelling prejudice which the trial court could not prevent." United States v. Wilson, 657 F.2d 755, 765 (5th Cir.1981), cert. denied, 455 U.S. 951, 102 S.Ct. 1456, 71 L.Ed.2d 667 (1982). We conclude that Jackson has not met this burden. By carefully worded jury instructions the district court effectively neutralized the possibility of prejudicial effect resulting from spillover evidence. Further, the district court took pains to aid the jury in distinguishing between the defendants. The potential for prejudice was averted by the trial court's meticulous management of this complex and lengthy proceeding.

The convictions are AFFIRMED. Bryan's motion to dismiss the conspiracy charge on grounds of double jeopardy should have been granted and the matter is REMANDED for entry of an appropriate order of dismissal as to that count.

JUDGEMENT OF THE 5TH CIRCUIT COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-1327

D. C. Docket No. CR-3-87-116-T

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

JOHN WORLEY,
Defendant-Appellant

Appeals from the United States District Court for the
Northern District of Texas

Before, GOLDBERG, POLITZ, and JONES, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the Judgment of the District Court in this cause is affirmed.

February 22, 1990

ISSUED AS MANDATED: March 16, 1990

JUDGEMENT OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

UNITED STATES OF
AMERICA

V. JUDGMENT IN A
CRIMINAL CASE

JOHN WORLEY
2511 Copper Creek Case Number:
Carrollton, TX CR3-87-116-T

S.S. # 585-48-2977
Tom Mills
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:
not guilty as to count(s) 1, 8

THERE WAS A:
verdict of guilty as to count(s) Ct. 1 and Ct. 8.

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: Conspiracy to defraud the USA by impeding, impairing, obstructing, and defeating the lawful functions of the Internal Revenue Service in the ascertainment, computation, assessment and collection of income taxes in violation of Title 18, United States Code, § 371 as charged in Ct. 1 and willfully aiding and assisting in the preparation of false tax returns in violation of § 7206(2) of the Internal Revenue Code, § 7206(2) as charged in Ct. 8 of the indictment. (Ct. 1, January 1981 - end of 1985; Ct. 8, on or about June 1984)

IT IS THE JUDGMENT OF THIS COURT THAT:
On Cts 1 and 8, imposition of the sentence of imprisonment is suspended and the defendant is placed on probation for five (5) years with the following special condition:

That the defendant perform 250 hours of community service as directed by the U. S. Probation Office.

IT IS FURTHER ORDERED that the Cost of Prosecution not to exceed $6,000.00 are assessed.

No fine was ordered for the reasons stated on the record.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or if questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $50.00 pursuant to Title 18, U.S.C. § 3013 for count(s) Ct.1 as follows:

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

May 26, 1988
Date of Imposition of Sentence

_____
Signature of Judicial Officer

ROBERT B. MALONEY
U. S. District Judge
May 26, 1987

ORDERS DENYING MOTIONS FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-1327

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

JAMES G. BRYAN, JAMES A. HEARN,
EUGENE R. JACKSON, JOHN WORLEY,
and JULIAN MALCOMSON,
Defendants-Appellants,

Appeals from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING
(March 26, 1990)

Before GOLDBERG, POLITZ, and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing as to Julian Malcomson ONLY, filed in the above entitled and numbered cause be and same is hereby denied.

ENTERED FOR THE COURT:

_____
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-1327

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

JAMES G. BRYAN, JAMES A. HEARN,
EUGENE R. JACKSON, JOHN WORLEY,
and JULIAN MALCOMSON,
Defendants-Appellants,

Appeals from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING
(March 26, 1990)

Before GOLDBERG, POLITZ, and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing as to Jackson only/filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

_____
United States Circuit Judge

GRAND JURY INDICTMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	*	CRIMINAL NO. CR3-87-116-T
V.	*	
JAMES G. BRYAN	*	
ROBERT J. (JACK) BRYAN	*	
RAUL COSTALES	*	
JAMES R. CURTIN	*	
ALLAN L. DOLAN	*	
LYNFORD R. EVANS	*	
MITCHELL E. EXCTAIN	*	
ELMER H. HASKINS	*	
WAYNE M. HASKINS	*	
JAMES A. HEARN	*	
EUGENE R. JACKSON	*	
JULIAN MALCOMSON	*	
RICHARD W. MORRIS	*	
MICHAEL K. MULFORD	*	
JAN T. SHELTON	*	
MICHAEL K. SHELTON	*	
GEORGE SPRAGUE	*	
JUDITH THOMASON (CURTIN)	*	
ANTHONY VIRTUE	*	
ANDREAS WIEDENFELD	*	
RONALD F. WILLIAMS	*	

JOHN WORLEY *

The Grand Jury Charges:

COUNT 1

From on or about January, 1981, the exact date being unknown to the Grand Jury, and continuing up to the end of 1985, in the Dallas Division of the Northern District of Texas, and elsewhere, including the Cayman Islands, JAMES G. BRYAN, ROBERT J. (JACK) BRYAN, RAUL COSTALES, JAMES R. CURTIN, ALLAN L. DOLAN, LYNFORD R. EVANS, MITCHELL E. EXCTAIN, ELMER M. HASKINS, WAYNE M. HASKINS, JAMES A. HEARN, EUGENE R. JACKSON, JULIAN MALCOMSON, RICHARD W. MORRIS, MICHAEL K. MULFORD, JAN T. SHELTON, MICHAEL K. SHELTON, GEORGE SPRAGUE, JUDITH THOMASON (CURTIN), ANTHONY VIRTUE, ANDREAS WIEDENFELD, RONALD F. WILLIAMS, and JOHN WORLEY, defendants, and other persons known and unknown to the grand jury, did unlawfully, knowingly and willfully combine, conspire, confederate, and agree to defraud the United States of America by impeding, impairing, obstructing, and defeating the lawful functions of the Internal Revenue Service of the Department of the Treasury of the United States in the ascertainment, computation, assessment and collection of revenue, to wit, income taxes.

At the times relevant to this indictment:

1. JAMES G. BRYAN was a resident of the Cayman Islands and Irvine, California. He was head of the United States Tax Planning Service (USTPS).

2. ROBERT J. (JACK) BRYAN was a resident of Irvine, California and son of JAMES G. BRYAN. He operated a USTPS franchise in Irvine, California.

3. RAUL COSTALES was a resident of Irvine, California. He worked with JACK BRYAN.

4. JAMES R. CURTIN was a resident of the Cayman Islands and worked for USTPS there, primarily with Professional Liability Insurance Corporation (PLIC).

5. ALLAN L. DOLAN was a resident of the Cayman Islands and Florida. He worked for USTPS in the Cayman Islands

6. LYNFORD R. EVANS was a resident of the Cayman Islands and a Certified Public Accountant (CPA).

7. MITCHELL E. EXCTAIN was a resident of the Cayman Islands.

8. ELMER M. HASKINS was a resident of Plymouth, Massachusetts and operated a USTPS franchise there.

9. WAYNE M. HASKINS was a resident of Houston, Texas and son of ELMER HASKINS. He operated a USTPS franchise in Houston, Texas.

10. JAMES A. HEARN was a resident of Dallas, Texas and operated a USTPS franchise there. He was a CPA.

11. EUGENE R. JACKSON was a resident of Houston, Texas and worked for Conti-Commodities Services, Inc. as a broker.

12. JULIAN MALCOMSON was a resident of St. Paul, Minnesota and operated a franchise there. He was an accountant.

13. RICHARD W. MORRIS was a resident of San Diego, California and an attorney.

14. MICHAEL K. MULFORD was a resident of Miami, Florida and an attorney.

15. JAN T. SHELTON was a resident of LaGrange, Georgia.

16. MICHAEL K. SHELTON was a resident of LaGrange, Georgia and married to JAN T. SHELTON.

17. GEORGE SPRAGUE was a resident of Charleston, South Carolina and operated a USTPS franchise there.

18. JUDITH THOMASON (CURTIN) was a resident of the Cayman Islands.

19. ANTHONY VIRTUE was a resident of the Cayman Islands.

20. ANDREAS WIEDENFELD was a resident of the Cayman Islands and Switzerland.

21. RONALD F. WILLIAMS was a resident of Dallas, Texas and operated a USTPS franchise there with HEARN.

22. JOHN WORLEY was a resident of Dallas, Texas and worked with the USTPS, Dallas franchise. He was an attorney.

MANNER AND MEANS

A. INTRODUCTION

It was part of the conspiracy that the defendants and co-conspirators, conspired to promote and sell to persons (clients) false and fraudulent tax deductions to be claimed on United States tax returns.

B. SPECIFIC OPERATION OF USTPS

1. It was a further part of the conspiracy that on or about January, 1981, JAMES G. BRYAN, defendant herein, created a company in the Cayman Islands called United States Tax Planning Service (USTPS).

2. It was further part of the conspiracy that JAMES G. BRYAN and other persons, both known and unknown, conducted seminars on behalf of USTPS on topics including tax shelters, the use of foreign tax havens and the use of foreign (non-U.S.) corporations. USTPS promoted and sold tax shelters to interested clients and used these seminars to generate clients.

3. USTPS franchised or licensed its offices to licensees throughout the United States. Clients generated by USTPS seminars were referred to the appropriate licensee for more detailed assistance.

4. To further the objects of the conspiracy three false and fraudulent tax shelters were established, commodities losses using Intercon Commodities, business expense insurance deductions using Professional Liability Insurance Corporation and charitable contribution deductions using Congregational

Church of Human Morality. Each tax shelter had as its purpose the generation of false and fraudulent tax deductions by enabling a participant to send money to the Cayman Islands and claim a false deduction while still maintaining control of the money. Clients were provided the following advice, information and instruction in order to obtain a tax deduction by one or more of these schemes.

a. Intercon Commodities, Inc.

The client was told to send a cashier's check payable to Intercon Commodities in the amount of the deduction recommended to the client. The check was forwarded to USTPS in the Cayman Islands. USTPS used Intercon Commodities, Inc. to allegedly make trades in commodities or contact brokerage firms to make trades.

The client was told that Intercon would enter into offsetting trades in an amount sufficient to generate the desired loss and would also generate a matching gain. The loss was assigned to the client and he was provided trade statements by USTPS through Intercon to document the loss to be claimed on his tax return.

The client was charged approximately $4,000 to allegedly set up a corporation in the Cayman Islands for the client's benefit and was also charged a $1,500 yearly maintenance fee. The gain side of the commodity transaction was assigned to the offshore corporation. The gain equalled approximately 90-92% of the money the client sent to USTPS. The remaining 8-10% was a fee charged by USTPS to each client to create a commodity loss.

The client was told that he could become consultant to this corporation and as consultant he could recommend how the money could be spent. The consultant's "recommendations" were always followed. USTPS participants were made directors of the corporation. The stock was placed in a trust and usually LYNFORD EVANS, defendant, was designated the trustee. The client was made "protector" of the trust and was told he could replace the trustee and that the

corporation could do nothing without the protector's permission. Clients were told this structure was necessary so the client could claim on his tax return that he did not have an interest in a foreign corporation or account.

The defendants knew the commodity loss would be deducted on a tax return and knew the client sustained no such tax deductible commodity loss.

b. Professional Liability Insurance Corporation

Clients were advised to purchase either malpractice insurance or revenue loss insurance from the Professional Liability Insurance Corporation (PLIC), a company operated by USTPS in the Cayman Islands. These clients were usually medical doctors or dentists.

If a client chose to purchase a policy from PLIC, a check payable to PLIC was sent to USTPS in the Cayman Islands. The client deducted this amount as a business expense. For approximately $4,000 a corporation was set up in the Cayman Islands for the benefit of the client similar to that used for commodities. If a client had both commodities losses and insurance deduction, he could use the same corporation. Approximately 92% of the money sent to PLIC was deposited into the corporation set up for the client. The client was told he could become "consultant" to the corporation. The client was also provided documents purporting to be an insurance policy but was told no matter what the policy said, the client could only obtain whatever funds went into the client's corporation.

The defendants knew the client did not pay or incur a tax deductible business expense for insurance. They knew in fact, the transaction was set up for tax purposes only and that the client kept control of 92% of the funds.

c. Congregational Church of Human Morality

Clients were advised to make tax deductible contributions to the Congregational Church of Human Morality (CCHM), which was operated in the Cayman Islands. These clients usually had college bound children. For an approximate

$2,000 fee the client could create a CCHM parish and become minister or advisor to the parish. Clients were advised that 92% of the contribution could be returned as a "scholarship" to whomever the client "recommended."

If a client chose to make a contribution to CCHM, he wrote a check or obtained a cashier's check in the desired amount and sent it to a licensee who then forwarded the check to a CCHM office in LaGrange, Georgia. The check was deposited in a bank there to avoid a deposit stamp with a Cayman Islands address.

The money in Georgia was then forwarded to the Cayman Islands. 92% of the "contribution" was made available to the client to benefit whomever he desired.

The defendants knew that the client did not in fact make a tax deductible contribution and knew that approximately 92% of the funds went back to benefit whomever the client desired.

Secrecy

3. It was further part of the conspiracy that all 22 of the named defendants, and other persons both known and unknown, were aware of USTPS' emphasis on maintaining the secrecy of its operations. Many of the defendants advocated and specifically used many of these methods. These methods were used to conceal the false and fraudulent nature of the income tax deductions. They included the following:

a. Licensees were advised by JUDITH THOMASON (CURTIN), defendant, and others, to use USTPS' system of avoiding mail with Cayman Island post-marks.

Mail from USTPS to licensees in the United States was sent in a sealed package by an island courier to Miami, Florida, or some other United States location. From there it was often sent by another courier to a licensee. The licensee was instructed to open the package and mail the letters. In this way all references to the Cayman Islands on the mail was avoided and no "red flags" were sent up.

b. Similarly, references to the Cayman Islands were avoided on outgoing documents; documents from the United States sent to the Caymans.

Documents and checks involving contributions to CCHM were routed through LaGrange, Georgia. Client "contribution" checks were deposited in a LaGrange bank to avoid a Cayman bank stamp on a cancelled check. JAN T. SHELTON, JUDITH THOMASON (CURTIN's sister), and MICHAEL SHELTON, defendants, handled the LaGrange operations for USTPS and CCHM.

Intercon Commodities was given a P. O. Box address in Miami, Florida when in fact is operated from the Cayman Islands.

c. Clients were told that they could make collect telephone calls to USTPS in the Caymans to avoid telephone records showing calls there. Clients were told such collect calls could be deducted from the offshore, Caymanian corporation set up for the client's benefit.

d. USTPS and its licensees used secret communication codes to transact business with each other.

At the beginning of USTPS, licensees were given the designation "CC" - client consultant as follows:

1. ROBERT J. BRYAN - CC01
2. ELMER M. HASKINS - CC04
3. WAYNE M. HASKINS - CC05
4. JAMES A. HEARN - CC06
5. JULIAN MALCOMSON - CC09
6. GEORGE SPRAGUE - CC13
7. RONALD F. WILLIAMS - CC16

USTPS' employees were given the designation "SC" - Synergy consultant. Synergy, Inc. was the name JAMES G. BRYAN, defendant, chose to give that group of people that managed the day to day operations and relations with the licensees.

8. JAMES G. BRYAN - SC12
9. JAMES R. CURTIN - SC07

10. ALLAN L. DOLAN - SC06
11. LYNFORD R. EVANS - SC04
12. MITCHELL E. EXCTAIN - SC03
13. MICHAEL K. MULFORD - SC28
14. JAN T. SHELTON - SC112
15. MICHAEL K. SHELTON - SC111
16. JUDITH THOMASON (CURTIN) - SC11
17. ANTHONY VIRTUE - SC 14
18. ANDREAS WIEDENFELD - SC02

As a result of its awareness of a Government investigation USTPS dropped the "CC" and "SC" designations and instead used the first and last letter of the last name. As an example, the name of defendant RONALD F. WILLIAMS was abbreviated to WS.

e. The offshore, Caymanian, corporations were created in such a fashion that the client had no documented ownership or control. The client was told he was protector of trust that held the corporation's stock and consultant to the corporation so he would not have to check on his tax return that he had an interest in a foreign corporation or account.

f. Licensees were told that all documents and fees relating to USTPS' offshore programs and clients were to be kept offshore so that the United States Government could not obtain them in the event of an investigation. Licensees signed agreements providing that in the event of an investigation, all documents not previously sent offshore were to be sent immediately.

4. It was further part of the conspiracy that once a client's money was sent offshore so that any of the three false and fraudulent tax deductions (commodities losses, insurance, and charitable contributions) could be taken, provisions were made by the defendants so that a client could bring his money back onshore (to the United States).

5. Clients were advised that they could choose to leave the money offshore and earn tax-free interest because it could not be discovered. They could also choose to bring the money

back onshore in a number of ways that would not be taxable because the relationship of the client to the offshore corporation could not be discovered.

a. A client could come to the Cayman Islands and take back amounts of currency under $10,000, which he would not have to report to Customs authorities when entering the United States.

b. The offshore corporation for which the client "consulted" could "loan" funds to the client which the client did not have to repay. Additionally, the clients were told that if they desired they could pay "interest" which was tax deductible on the "loan" and 90% of the interest payment would go back to the client's corporation.

c. A client could cause his offshore corporation to purchase stock of a domestic corporation, and then the client was given possession of the stock.

d. Clients could obtain a credit card or debit card in the offshore corporation's name so that card purchases would be made from the offshore corporation's bank account and not in the client's name. Additionally, clients were told they could take vacations and use the credit card to pay these personal expenses. If these expenditures were ever investigated the client could claim the travel was business related for the offshore corporation and no one could look beyond the face of the credit card.

e. A client could obtain "scholarships" for whomever he recommended (usually family members). Such scholarships were simply the return of their previous CCHM contributions, or PLIC deductions for which the client had claimed a tax deduction.

f. A client could obtain a "gift" from the offshore corporation.

g. A client could "sue" the offshore corporation and "settle" out of court.

6. It was further a part of the conspiracy that all of the defendants provided and caused to be provided documents and

advice for the purpose of having clients claim on the United States Income Tax Returns, false and fraudulent deductions for the commodities losses, insurance expenses and charitable contributions. The defendants thus willfully aided and assisted in, procured, counseled and advised the preparation of false and fraudulent income tax returns in violation of 26 U.S.C. § 7206(2).

OVERT ACTS

In furtherance of the conspiracy, and to effect the objects thereof, the following overt acts among others were committed:

1. On or about December, 1980, JAMES G. BRYAN moved to the Cayman Islands to take advantage of its secrecy laws. He created USTPS and gave nominal ownership to, among others, LYNFORD R. EVANS, JUDITH THOMAS (CURTIN) and ALLAN DOLAN.

2. On or about January, 1981, JAMES G. BRYAN, LYNFORD R. EVANS, and ALLAN DOLAN, among others, conducted a licensee training seminar in the Cayman Islands.

3. In or about the Fall of 1981, JAMES A. HEARN, among others, conducted a licensee training seminar in Dallas, Texas.

4. In or about September, 1981, JAN and MICHAEL SHELTON traveled to the Cayman Islands and met with JAMES G. BRYAN. They discussed the Congregational Church of Human Morality and the use of a LaGrange, Georgia address to avoid references to the Cayman Islands.

5. In or about October, 1981, RICHARD W. MORRIS was made head of Synergy and became responsible for supervising licensees.

6. In or about October, 1981, RONALD F. WILLIAMS met with JAMES A. HEARN and discussed United States Tax Planning Service and Worldwide Capital Management, Inc.

7. In or about December, 1981, ANDREAS WIEDENFELD and JULIAN MALCOMSOM discussed the formation of Intercon and fraudulent commodities transactions.

8. In or about April, 1982, EUGENE JACKSON and ANDREAS WIEDENFELD discussed the USTPS fraudulent commodity program at a licensee training seminar.

9. In or about February, 1983, JAMES G. BRYAN gave GEORGE SPRAGUE the right to become exclusive marketing director of USTPS franchises.

10. In or about March, 1983, MICHAEL K. MULFORD and GEORGE SPRAGUE developed a licensee training program in South Carolina.

11. In or about the dates and locations identified in Counts 2 to 25 which are incorporated by reference, the defendants caused the various false U. S. Income Tax Return to be prepared and filed with the Internal Revenue Service.

A violation of Title 18, United States Code, § 371.

COUNT 8

On or about June 5, 1984, in the Northern District of Texas, Dallas Division, RONALD F. WILLIAMS, JAMES G. BRYAN, LYNFORD R. EVANS, MITCHELL E. EXCTAIN, JAMES A. HEARN, MICHAEL K. MULFORD, JUDITH THOMASON (CURTIN), ANTHONY VIRTUE, and JOHN WORLEY, defendants, willfully aided and assisted in, and procured, counseled and advised the preparation and presentation to the Internal Revenue Service, of a U. S. Individual Income Tax Return, Form 1040, for Stuart R. and Sherry A. Kaplan for the calendar year 1983, which was false and fraudulent as to a material matter in that the return claimed on Schedule D, a loss from commodity transactions of $59,978.00, whereas, as the defendants well knew and believed the Kaplans did not sustain a tax deductible commodity loss.

In violation of § 7206(2) of the Internal Revenue Code; Title 26, United States Code, § 7206(2).

BILL OF PARTICULARS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	*	
	*	
	*	
V.	*	CRIMINAL NO.
	*	3-87-116-T
	*	
JOHN WORLEY	*	

GOVERNMENT'S RESPONSE TO THE
COURT'S ORDER FILED DECEMBER 22, 1987
RE BILL OF PARTICULARS FOR JOHN WORLEY

The Government first learned of the Court's Order the afternoon of January 12, 1988.

The defendant is charged with one count of conspiracy (Count one) and one count of Title 26, United States Code § 7206(2) (Count eight). Under a conspiracy theory, it is not necessary for the defendant to have performed any acts within Title 26, United States Code § 7206(2) to be convicted of that offense, provided the jury finds he became a member of the conspiracy and that the substantive offense was committed in furtherance of the conspiracy and that the defendant was a member of the conspiracy at the time of the commission of the substantive offense. Pinkerton v. United States, 328 U.S. 640 (1946); United States v. Parrish, 736 F.2d 152, 157 (5th Cir. 1984) and United States v. Thomas, 768 F.2d 611, 617 n.3 (5th Cir. 1985).

The Government will submit a requested Pinkerton instruction.

While the United States need only prove WORLEY'S membership in the conspiracy at the time the substantive offense was committed to establish his guilt of the substantive offense, the United States will also prove WORLEY'S direct participation in the sale of a commodities loss to the Kaplans.

As evidenced by Government's Exhibit 103 (attached), which has been available to defense counsel since approximately May, 1987, Stuart Kaplan met with JOHN WORLEY on approximately November 7, 1983 and discussed the purchase of various tax shelters, including "our commodity investment." The Kaplans subsequently corresponded with WORLEY, as evidenced by the exhibit, and made a decision to execute the transaction.

WORLEY met with one or more of the Kaplans again in mid-November, 1983 and discussed, among other things, the commodities program.

Numerous correspondence occurred between the Kaplans and WCM, Ron Williams, and entities in the Cayman Islands during at least November, December, 1983, and January, 1984, related to the "commodities investment."

In addition to meeting with Stuart Kaplan, WORLEY discussed the Kaplan's commodities program with Mike Cole (see Exhibit 103) during approximately November, 1983.

WORLEY also discussed the Kaplan's commodities program with Ron Williams commencing in approximately November, 1983. WORLEY may have assisted or been involved in the production of documents with Ron Williams and/or WCM that related to the Kaplans.

WORLEY may have met with one or more of the Kaplans subsequent to the two meetings in November, 1983. However, the majority of his assistance occurred in November, 1983, in direct conversations with Stuart Kaplan.

The above information, the Government believes, adequately notifies WORLEY of the charges against him in

order to avoid surprise or to bar further prosecution for the same offense. Wong Tai v. United States, 273 U.S. 72 (1927).

The Government does not through this response suggest that this is all of the evidence it may produce against JOHN WORLEY. There is more evidence related to WORLEY'S participation in the conspiracy, and indirectly, to the Kaplans. However, the information provided is the majority of WORLEY'S direct involvement with the Kaplans in Count eight.

Respectfully submitted,

MARVIN COLLINS
United States Attorney

DAVID BARGER
Trial Attorney
Department of Justice
Washington, D.C.

DAVID FARNHAM
Trial Attorney

8321 South 8th. Street
Broken Arrow, OK. 74011
November 17, 1983

Mr. John Worley
Worldwide Capital Mgt. Corp.
4100 Spring Valley Road
Ste. 307
Dallas, Texas 75234

Dear John:

Enjoyed our meeting in Dallas this past Tuesday. I am sure you will be hearing from Mike Cole within the week.

Enclosed is our check for $6644.00, which represents 75% of your company's estimated 1983 planning fee. Also, our check for $4000.00 to AME Management.

We have the capital in place to execute the Equipment Lease Package and to complete our commodity investment.

Mentally, we are about 75% confident about the entire transaction. Please keep us informed of the transaction procedures and the results.

Regards,

STUART R. KAPLAN

enc.

PROPOSED JURY INSTRUCTION

DEFENDANT WORLEY'S PROPOSED JURY INSTRUCTION NO._____

You are instructed that § 951 through 957, 551 through 557, and 671 through 679 of the Internal Revenue Code set forth the legal requirements for a foreign corporation or trust to be considered a controlled foreign corporation, a foreign personal holding company, or a foreign trust.

§ 951 through 957 provide that in order for a foreign corporation to be considered a controlled foreign corporation which is taxable to a U. S. shareholder, certain stock requirements must be met. Unless you find beyond a reasonable doubt that the taxpayers in question owned stock in the foreign corporations, you must find that the corporations are not controlled foreign corporations as set forth in § 951 through 957 of the Internal Revenue Code.

§ 551 through 557 of the Internal Revenue Code set forth additional stock ownership requirements in order for a foreign corporation to be considered a foreign personal holding company subject to taxation to the U. S. shareholder. Unless you find beyond a reasonable doubt that the taxpayers in question owned stock in the foreign corporations, you must find that the corporations were not foreign personal holding companies as set forth in § 551 through 557.

§ 671 through 679 of the Internal Revenue Code set forth the legal requirements for a trust to be considered taxable to a U. S. beneficiary. Unless you find beyond a reasonable doubt that the taxpayers in question transferred property to a trust which had U. S. beneficiaries, you must find that the trust is not taxable to the U. S. taxpayer.

Unless you find beyond a reasonable doubt that the foreign corporations involved in the commodities and insurance transactions were controlled foreign corporations or foreign personal holding companies, and unless you find beyond a reasonable doubt that the trust which held the shares of the corporation is taxable to a U. S. taxpayer, you may not consider any activities undertaken or conducted on behalf of the corporation in relation to transactions undertaken by U. S. taxpayers.

In this regard, if a U. S. taxpayer had a loss, any gain associated with the foreign corporation does not offset the loss in any way.

MONEY MAGAZINE ARTICLE

REPRINT OF MONEY MAGAZINE ARTICLE
March 1989, p. 110

TAXES: THE PROS FLUNK OUR NEW TAX-RETURN TEST

Fifty preparers fared even worse on this year's test than their counterparts did last year. And this time there were no excuses.

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by Greg Anrig, Jr.

A year ago, during the first filing season under the Tax Reform Act of 1986, MONEY asked 50 tax professionals to complete a 23-form 1040 return for a hypothetical family. The results were unnerving; no two preparers computed the same tax due--and worse, the answers varied by as much as 50%. The preparers had an excuse, however: the law was ridiculously complex and so new that the Internal Revenue Service had not yet published important regulations.

Since then, preparers have had a full year of practice completing actual tax returns and many months to examine critical regulations the IRS issued. Yet this time, when MONEY asked another 50 preparers who volunteered to compute the tax owed by a new hypothetical family, the answers were more off the mark than a year ago. What's their excuse this year? (A separate MONEY study revels the IRS doesn't have its act together, either. See page 112). The results:

* Again, each participant computed a different tax for the family. And the bottom line ranged astonishingly from a low of $12,539 to a high of $35,813.

* The accountant who designed the test (and gave the correct tax as $23,393) and 10 others made no significant

errors. But all the rest did--some missing such basics as dependency exemptions, the penalty tax on early pension distributions and the wash-sale rule on stock sales.

* Preparers' fees for the 11 accurate returns ranged from $325 to $2,500, and the time spent completing the forms varied from four to 20 hours. Four preparers who made major mistakes charged more than $1,500 and two of the four worked on the problem for 20 hours or more.

* The errors, which of course could expose the family to an IRS audit and penalties, tended to cut the family's tax bill. That's why the $21,729 average tax due among the 50 participants is well below the $23,393 the test's author arrived at.

"I was completed surprised by the results," said Wesley R. Fitzpatrick, senior tax partner in the Portland, Ore. office of the national accounting firm of Grant Thornton, who designed the test. "When the tax reform law was new, you could understand the confusion, but now it's hard to explain all the mistakes about fundamental rules." MONEY chose Fitzpatrick because he displayed an extraordinary grasp of the tax code as a participant in last year's exam.

It was especially hard for those who made the mistakes to explain them. Some oversights were so clear-cut that when we asked the preparers about their answers, they often expressed defenseless dismay. Among the responses uttered more than one: "I can't add," "Can I still change it?" and "We blew it."

Test author Fitzpatrick's computation of $23,393 for the family's tax is not the only possible correct answer. The 10 other participants who made no mistakes calculated taxes of up to $24,493. (For simplicity's sake, we assumed no withholdings.) The variation arises because the tax law is still unclear in some situations. Thus more aggressive preparers like Fitzpatrick could legitimately deduct larger amounts while others played it more conservatively. Some small variations also arouse out of independent assumptions that the preparers made about details not spelled out in the 4 1/2-page

hypothetical profile. Many participants, for example, deemed a third home owned by the family to be investment property rather than real estate used for personal purposes, which affect interest deductions. The preparers, however, had been urged to call us if they had questions or needed help interpreting the problem.

The participants included 30 certified public accountants from local firms, 12 preparers from franchise outlets such as H & R Block, five independent enrolled agents--who are licensed to practice by the Internal Revenue Service--and three C.P.A.s from national accounting companies. Nationwide, there are an estimated 375,000 C.P.A.s, 50,000 preparers working out of storefront outlets and 26,000 enrolled agents. Of the 98.5 million personal tax returns filed in 1987, 46.6 million--47%--were completed by such professionals.

Meet Your Friendly IRS Helper--If You Dare.

Remember last year's tax-filing season? There, amid the shrieks and bloodletting of your first encounter with the new tax law, stood IRS Commissioner Lawrence B. Gibbs, serenely confessing that the people down at the IRS who answered your tax questions by telephone were not really helpful. They were nearly as befuddled over the new law as you were. Now Gibbs is back promising vast improvements. After all, the temporary phone workers have been hired full time and trained for months. This year will be better.

Not so fast, Mr. Gibbs. A new MONEY test reveals that the IRS' phone assistors are giving wrong answers a ridiculously high 41% of the time. That's only four points better than the IRS' score on a similar MONEY survey a year ago. As we did in 1988, this January we placed total of 100 calls to assistors all across the country. Each assistor was asked one of 10 questions, and each question was posed to 10 different IRS employees. The dismal toll: 59 correct.

Our queries were not deliberate brain benders, either. They were typical of what the assistors were likely to encounter: Can a taxpayer count a subscriptions to MONEY as a miscellaneous deduction if he or she uses the magazine to help with investment and tax planning decisions? (Only two out of 10 correctly answered yes.) IRS spokesman Frank Keith declined to comment on MONEY's study. "We monitor our phone assistors ourselves and we expect their performance to be significantly improved this year," he asserted.

Given last year's poor IRS record, the new taxpayer's bill of rights waives the penalties on such IRS-inspired mistakes that show up on your tax form--but only if you can prove that the IRS misled you by producing written documentation of the blunder. Good luck. Who ever heard of bureaucracy that willingly put it in writing? Whenever we asked for documentation of the answers we got, the IRS assistor said we had to mail in our questions first. Twice when we requested written verification of a wrong answer, the assistor transferred us to a supervisor who provided the right one. But another time when we asked for confirmation of a correct reply, we were transferred to a supervisor who--are your ready?--changed the answer to a wrong one.

G.A. Jr., and Sylvia Steinert